

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2139

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOSEPH ROBIN HOOD,

Petitioner-Appellant,

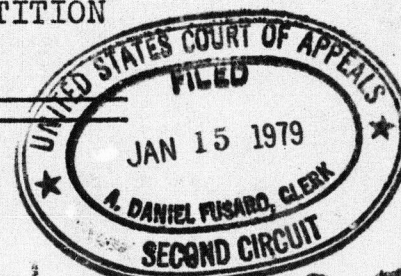
-against-

J. E. LaVALLEE, Superintendent,
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.
-----X

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF
NEW YORK DENYING AND DISMISSING A PETITION
FOR A WRIT OF HABEAS CORPUS.

APPENDIX
BRIEF FOR PETITIONER-APPELLANT



JOSEPH ROBIN HOOD
Petitioner-Appellant, pro se
Box G
Wallkill, New York 12589

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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--against--

J. E. LaVALLEE, Superintendent,
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.
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PRELIMINARY STATEMENT

Petitioner-appellant, JOSEPH ROBIN HOOD, a state prisoner, appeals from an order, dated February 13, 1976, of the United States District Court for the Northern District of New York, denying and dismissing a petition for a writ of habeas corpus.

QUESTION PRESENTED

Whether the imposition of a mandatory life sentence upon petitioner-appellant for the single sale of a small quantity of heroin abridged appellant's constitutional right under the Eighth Amendment to be free from cruel and unusual punishment.

STATEMENT OF FACTS

Petitioner-appellant (hereinafter referred to as appellant) was arrested on October 11, 1973, on a charge of criminal sale of a controlled substance in the third degree, based on an indictment returned by an Albany County Grand Jury, dated October 10, 1973.

On January 2, 1974, appellant went to trial on this charge in the Albany County Court (John J. Clyne, J.). The People's proof established that appellant, on September 24, 1973, sold two bags of heroin for thirty dollars to an undercover police officer. Appellant was found guilty, on January 4, 1974, of a criminal sale of a controlled substance in the third degree (a Class A-III felony). On January 10, 1974, appellant was sentenced to seven years to life imprisonment.

On appeal to the Appellate Division of the Supreme Court, Third Judicial Department, appellant contended, among other things, that the imposition of the mandatory life sentence abridged appellant's constitutional right under the Eighth Amendment to be free from cruel and unusual punishment. The Appellate Division affirmed the judgment of conviction (People v. Hood, 46 A.D.2d 837, 361 N.Y.S.2d 410; see, also, 47 A.D.2d 971, 366 N.Y.S.2d 696), and

leave to appeal to the New York Court of Appeals was thereafter denied.

Appellant, acting pro se, then petitioned the United States District Court for the Northern District of New York for a writ of habeas corpus, raising, inter alia, the cruel-and-unusual-punishment claim set forth above. On February 13, 1976, the District Court (James T. Foley) denied and dismissed the petition for a writ of habeas corpus in an unreported opinion.

After the District Court denied a certificate of probable cause, this Court, on July 25, 1977, granted such a certificate "limited to petitioner's claim based upon the Eighth Amendment." This Court further granted appellant's motion for leave to proceed in forma pauperis and for the assignment of counsel. By a further order, this Court assigned Debra Greenberg as counsel to prosecute the appeal on appellant's behalf.

In July 1978, appellant's counsel made application to this Court to be relieved of the assignment. Counsel contended that the precise question raised by appellant on this appeal was adversely decided by this Court in Carmona v. Ward, 576 F.2d 405, petition for rehearing en banc denied (June 27, 1978), and consequently appellant's appeal would be frivolous and would violate counsel's responsibility to this Court. On July 15,

1978, the application to be relieved of the assignment was granted by this Court (James Oakes, J.).

On September 18, 1978, this Court denied an application by appellant for the assignment of new counsel. By a further order of this Court, dated October 17, 1978, appellant was ordered to file the record on appeal with this Court on or before November 27, 1978, and to file his pro se brief with this Court on or before January 26, 1979.

By letter, dated November 14, 1978, appellant requested the Clerk of the United States District Court for the Northern District of New York to transmit the record to the United States Court of Appeals for the Second Circuit in order to permit appellant to prosecute the appeal pro se.

ARGUMENT

POINT I

THE IMPOSITION OF THE MANDATORY
LIFE SENTENCE ON APPELLANT FOR
HIS CONVICTION UNDER PENAL LAW
§ 220.39(1) ABRIDGED APPELLANT'S
CONSTITUTIONAL RIGHT UNDER THE
EIGHTH AMENDMENT TO BE FREE FROM
CRUEL AND UNUSUAL PUNISHMENT.

Appellant, who was 43 years old at the time of his arrest, stands convicted of criminal sale of a controlled substance in the third degree, a Class A-III felony. The

state's evidence established that appellant sold two bags of heroin to an undercover police officer for thirty dollars. For this single thirty-dollar sale of a controlled substance appellant was sentenced to the mandatory term of life imprisonment. Appellant's minimum term was set as seven years, making appellant ineligible for parole until October 1980, at which time appellant will have spent seven straight years in prison.

Throughout the state appellate proceedings and in the proceeding below for a writ of habeas corpus, appellant contended that the mandatory imposition of a life sentence for the single sale of such a small quantity of a controlled substance violated appellant's Eighth Amendment right against cruel and unusual punishment. Specifically, appellant contended, as he continues to contend on this appeal, that his sentence of seven years to life imprisonment is so grossly out of proportion to the crime of which he stands convicted as to amount to an infliction upon appellant of cruel and unusual punishment.

Appellant recognizes that only recently this Court has rejected these precise arguments in the case of Carmona v. Ward, 576 F.2d 405, petition for rehearing en banc denied (June 27, 1976). In view of Carmona, it

is apparent that appellant cannot be successful on this appeal. However, since a petition for a writ of certiorari has been filed in the Carmona case with the Supreme Court of the United States, there exists the possibility that the Supreme Court may grant review in that case and reverse the determination of this Court. Appellant's purpose, therefore, in pursuing this appeal is to obtain a final order of this Court which will allow appellant to file for a writ of certiorari in the event the Supreme Court elects to hear the Carmona case.

CONCLUSION

FOR THE ABOVE-STATED REASONS, APPELLANT PRAYS THAT AN ORDER ISSUE AFFIRMING THE JUDGMENT BELOW.

Dated: Wallkill, New York
January 5, 1979.

Respectfully submitted,

JOSEPH ROBIN HOOD
Petitioner-Appellant, pro se
Box G
Wallkill, New York 12589

EAGLE-A
TYPE-BRAE
AFFIDAVIT OF SERVICE

JOSEPH ROBIN HOOD, being duly sworn, deposes and says:

On the 5th day of January, 1979, I personally delivered a true copy of the within appeal brief, contained in a securely enclosed envelope, to be transmitted by United States Mail to the person hereinafter named, at the place and address stated below:

Hon. Robert Abrams
Attorney General of New York
Two World Trade Center
New York, New York 10047

Joseph Robin Hood
JOSEPH ROBERT HOOD

Sworn to before me this

5 day of January, 1979.

Harvey Freeman

HARVEY FREEMAN 4544010
Notary Public, State of New York
Qualified in Orange County
Commission Expires March 30, 1980

09 JAN 1979

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
JOSEPH ROBIN HOOD,

Petitioner,

-against-

75-CV-

J. E. LaVALLEE, Superintendent,
Clinton Correctional Facility,
Dannemora, New York,

76-CV- 71

Respondent.

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION and ORDER

Petitioner is an inmate of Clinton Correctional Facility and files a substantial application of 43 typewritten pages with legal points set forth therein for a federal writ of habeas corpus.

After a jury trial in the Albany County Court (John J. Clyne, J.), petitioner was convicted of the crime of criminal sale of a controlled substance in the third degree. As required by the law [Penal Law, § 220.39(i)], petitioner was sentenced to an indeterminate term of imprisonment of a minimum of seven years and a maximum of life. Petitioner appealed to the Appellate Division, Third Department, which affirmed [People v. Hood, 46 A.D. 2d 837 (1974), in reargument 47 A.D. 2d 971 (1975)], and the New York Court of Appeals denied leave to appeal on October 1, 1975.

Upon reading of the Appellate Division's opinions and of this present petition, it is apparent that petitioner is using the brief prepared by his attorney in the Appellate Division as his petition for federal habeas corpus. For that reason, this Court did not follow the usual course necessary to secure the briefs of both parties on the appeal to the Appellate Division. Further, the status of the law seemed clear enough as it applied to the petition herein without the assistance of these briefs.

The first point in petitioner's brief, which also encompasses the second and third points, challenges the punishment imposed by the Penal Law as cruel and unusual. The second point reads: "The

sentencing provisions of Penal Law Section 70.00(2)(a) as applied to a conviction under Penal Law section 220.39(I) violates the principle of the separations of powers implicit in the Constitution of the State of New York". The third point charges that CPL, section 220.10(c)(a) is unconstitutional as hampering the power of the District Attorney. The second and third points are essentially branches of the first point.

The Appellate Division, in its affirmance of the conviction, stated that the sentence did not constitute cruel and unusual punishment and cited *People v. Venable*, 46 A.D. 2d 73. That case has since been affirmed by the Court of Appeals at 37 N.Y. 2d 100 (1975), holding that the sentencing statutes, while severe and inflexible, and punish the crimes more severely than other crimes, and the same crime in other States, are not irrationally severe.

Moreover, the federal cases cited in my judgment do not help petitioner. The Court of Appeals, Second Circuit, held in *United States ex rel. Marcial v. Fay*, 267 F.2d 507 (2d Cir. 1959) that where the sentence is within the limitation set by law, its severity would not be grounds for relief in habeas corpus. An illegal sentence does not void the conviction and justify petitioner's discharge. *U.S. ex rel. Nelson v. Zelker*, 335 F. Supp. 85 (S.D.N.Y. 1971). A sentence does not constitute cruel and unusual punishment where it is within the limits of the law. *Jones v. Superintendent, Virginia State Farm*, 360 F. Supp. 575, 577 (W.D. Va. 1973).

There is no federal merit to my mind in the first three points nor is there federal merit in the remaining points. Point IV argues that petitioner's due process right to negotiate guilty pleas was unconstitutionally abridged by the Legislature. Since petitioner did not plead guilty, this contention is irrelevant.

The fifth point that the court erred in denying defendant's request to charge the jury on the affirmative defense of entrapment and the sixth point that the prosecutor's conduct in aiding a

material witness to leave the jurisdiction deprived defendant of a fair trial deal with matters of State law and do not warrant federal habeas corpus relief. Lee v. Henderson, 342 F. Supp. 561, 563 (W.D.N.Y. 1972); Schaefer v. Leone, 443 F.2d 182, 185 (2d Cir. 1971).

The seventh point is that the court committed reversible error by permitting bolstering of an in-court identification by evidence of a prior identification by photograph. Petitioner does not claim misidentification by this procedure, but it seems the photograph was used by a trooper for purposes of arrest. There is not shown a very substantial likelihood of irreparable misidentification in violation of federal constitutional rights. Therefore, there is no basis for federal habeas corpus relief. U.S. ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973).

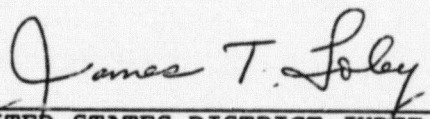
The eighth point that the Trial Court committed reversible error in admitting evidence of the substance alleged to have been sold deals with a matter of State evidence and forms no basis for federal habeas corpus. U.S. ex rel. Terry v. Henderson, 462 F.2d 1125 (2d Cir. 1972). The final point also deals with a matter of evidence and forms no basis for federal habeas corpus.

The petition is denied and dismissed and shall be filed by the Clerk without payment of the usual fee.

It is so Ordered.

Dated: February 13, 1976

Albany, New York


UNITED STATES DISTRICT JUDGE

Feb. 17	1	Filed Petition for Writ or Habeas Corpus
Feb. 17	2	Filed Memorandum-Decision and Order of Judge Foley (2/13/76) denying and dismissing the petition for writ of habeas corpus & directing the Clerk to file the papers without payment of the usual fee
Feb. 17	3	Filed Judgment
Apr. 19	4	Filed receipt for papers sent to CCA 2nd Cir.
Aug. 30 1977		Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
Sept. 23	5	Filed receipt for papers sent to CCA, 2nd Cir. --
<u>1978</u>		
Mar. 29	6	Received all papers from C.C.A., 2nd Cir.
May 22	7	Filed certified copy of stipulation withdrawing appeal
Nov. 1	8	Filed Scheduling Order

Appendix
77-2139

By: *William A. Murphy*
~~Attest: [Signature]~~
 Deputy Clerk
 William A. Murphy

Recd 1/24/78